
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

LESLIE M. SIBERELL *et al.*,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 16,215.

PETITION FOR REHEARING.

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Come now the appellants, by their attorney, and file this their Petition for Rehearing of the Judgment entered by the Court on June 9, 1959, affirming the judgment of the court below.

Appellants reserve their argued position as to each of the points of appeal, but in this petition address themselves solely to a feature of the decision wherein they believe the court may be convinced its result is incorrect.

The decision should be reconsidered and for the following reasons:

The *per curiam* slip opinion concludes:

“We are unable to say that the district court abused its discretion in denying appellant’s motion.”

Petitioners respectfully urge that this Honorable Court has overlooked what appellee’s brief itself concedes (although counsel who orally argued the appeal in the

government would not go so far) that the government was negligently at fault in the condemnation proceedings, as will be related herein.

In brief, by way of background: appellants, by their motion, had urged the district court to permit them to show that the value of the condemned mineral land was much closer to \$100,000.00 than to the \$100.00 awarded by default; that none of them had ever been served in the proceedings; that the affidavit for service by publication was false in that no diligent search could have been made without a discovery of the heirs of Minnie V. Siberell, the owner of the condemned 60 acre parcel, known in these proceedings as Parcel 481.

Appellee's Brief on page four concedes this fatal flaw in the government's condemnation proceeding.

The law on service by publication is clear. Rule 71A (d) (3) (ii) authorizes such service after the filing of a certificate by plaintiff's attorney "stating that he believes a defendant cannot be personally served, *because after diligent inquiry within the state in which the complaint is filed etc.*" (Emphasis supplied).

It is conceded by the government's brief writer (on said page four) that "the records in San Bernardino County disclosed that one of the owners of a mining claim on Parcel 481 was Minnie V. Siberell (denoted as *both* "Siberell" and "Liberell" in these records) (Emphasis supplied).

There it is. There was no excuse for overlooking that Siberell was the name. Siberell is a name concededly also

to be found in the Los Angeles County records and from the records of both counties it would have been simple (Los Angeles telephone directory) for any competent investigator to have located the Siberells interested in the proceedings.

Accordingly, the only conclusion is that justice in the trial court was as blind as in the investigation of defendants' addresses.

It is not sound legal discretion to deny an unserved defendant an opportunity to have his day in court when it is indisputable that plaintiff is at fault.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellants' brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ,

Attorney for Appellants.

